

1
2 UNITED STATES DISTRICT COURT
3 DISTRICT OF MASSACHUSETTS

4
5 IN RE: NEW ENGLAND COMPOUNDING) MDL NO. 13-02419-RWZ
6 PHARMACY CASES LITIGATION)
7)
8)

9 BEFORE: THE HONORABLE RYA W. ZOBEL AND
10 THE HONORABLE JENNIFER C. BOAL
11

12 **MOTION HEARING**
13 **AND**
14 **STATUS CONFERENCE**
15

16 John Joseph Moakley United States Courthouse
17 Courtroom No. 12
18 One Courthouse Way
19 Boston, MA 02210

20 November 12, 2015
21 2:00 p.m.

22 Catherine A. Handel, RPR-CM, CRR
23 Official Court Reporter
24 John Joseph Moakley United States Courthouse
25 One Courthouse Way, Room 5205
Boston, MA 02210
E-mail: hhcatherine2@yahoo.com

1 APPEARANCES:

2 For The Plaintiffs:

3
4 Hagens, Berman, Sobol, Shapiro LLP, by KRISTEN JOHNSON,
5 ESQ., 55 Cambridge Parkway, Suite 301, Cambridge, Massachusetts
6 02142;

7 Janet, Jenner & Suggs, LLC, KIMBERLY A. DOUGHERTY, ESQ., 75
8 Arlington Street, Suite 500, Boston, Massachusetts 02116;

9 Branstetter, Stranch & Jennings, PLLC, by J. GERARD STRANCH,
10 ESQ., and BENJAMIN GASTEL, ESQ., 227 Second Avenue North,
11 Nashville, Tennessee 37201-1631;

12 Ellis & Rapacki LLP, by FREDRIC L. ELLIS, ESQ., 85 Merrimac
13 Street, Suite 500, Boston, Massachusetts 02114;

14 Lieff Cabraser Heimann & Bernstein, LLP, by ANNIKA K.
15 MARTIN, ESQ., 250 Hudson Street, 8th Floor, New York, New York
16 10013-1413;

17 Lieff Cabraser Heimann & Bernstein, LLP, by MARK P. CHALOS,
18 ESQ., 150 Fourth Avenue North, Suite 1650, Nashville, Tennessee
19 37219;

20 Leader, Bulso & Nolan, PLC, by GEORGE H. NOLAN, ESQ., 414
21 Union Street, Suite 1740, Nashville, Tennessee 37219;

22 FOR PAUL D. MOORE, IN HIS CAPACITY AS CHAPTER 11 TRUSTEE OF
23 NECP, INC.:

24 Duane Morris LLP by MICHAEL R. GOTTFRIED, ESQ., 100 High
25 Street, Suite 2400, Boston, Massachusetts 02110-1724;

(Appearances continued on the next page.)

1 APPEARANCES (Cont'd):

2
3
4 FOR THE DEFENDANTS:

5 Gideon, Cooper & Essary, PLC, by CHRIS J. TARDIO, ESQ., 315
6 Deaderick Street, Suite 1100, Nashville, Tennessee 37238;

7 Todd & Weld LLP, by CORRINA L. HALE, ESQ., 28 State Street,
8 31st Floor, Boston, Massachusetts 02109;

9 Fulbright & Jaworski, LLP, by MARCY H. GREER, ESQ., and
10 ADAM T. SCHRAMEK, ESQ., 98 San Jacinto Blvd, Suite 1100, Austin,
Texas 78701;

11 Pessin Katz Law, P.A., by GREGORY K. KIRBY, ESQ., 901
12 Dulaney Valley Road, Suite 400, Towson, Maryland 21204;

13 Law Offices of Jay Blumberg, by JAY J. BLUMBERG, ESQ., 158
14 Delaware Street, P.O. Box 68, Woodbury, New Jersey 08096;

15 CAPPLIS, CONNORS & CARROLL, PC, by JESSICA L. CUMMINGS,
16 ESQ., 18 Tremont Street, Suite 220, Boston, Massachusetts 02108.

17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(The following proceedings were held in open court before the Honorable Rya W. Zobel, United States District Court Judge, and the Honorable Jennifer C. Boal, Magistrate Judge, United States District Court, District of Massachusetts, at the John J. Moakley United States Courthouse, One Courthouse Way, Boston, Massachusetts, on November 12, 2015.)

THE COURT: Good afternoon. Please be seated.

COURTROOM DEPUTY CLERK URSO: This is In Re: New England Compounding. It's MD-13-2419.

THE COURT: All right. Any reason not to start with your, as usual, fantastic agenda?

MS. JOHNSON: Thank you, your Honor. No, we would suggest that we begin there.

THE COURT: Okay.

MS. JOHNSON: The only argument we have up for oral argument today is the plaintiff Wayne Reed's motion to set the case for trial and, if the Court would indulge me, I would like to give a background of where we are in Bellwether and trial schedules that I think may provide some context.

THE COURT: Let me remember what the issue is. As I recall, he either was dying or had died and he wanted to have an earlier trial, and we put it off until we decided whether we had jurisdiction, which I've now decided we do.

So, the question, I gather, is whether he fits into

1 any kind of a schedule that is based on both parties
2 submitting cases to be tried in the early trials; is that
3 correct?

4 MS. JOHNSON: I'll let Mr. Nolan speak to whether he
5 agrees with that, but in terms of the context, your Honor,
6 there are, you're correct, competing proposed Bellwether trial
7 schedules that have been filed by the plaintiffs and
8 defendants. Those are ECF 2341 and 2342. That's one issue
9 that's before the Court that would relate to this type of
10 scheduling matter.

11 Another issue is within those Bellwether trial
12 submissions, the parties propose different paths forward. The
13 defendants propose a posture that includes strikes and the
14 ability to strike a certain number of the other side's cases.
15 Plaintiffs propose decreasing the size of the pool of cases,
16 but without formal strikes.

17 Thirdly, we also have -- the defendants have filed a
18 notice of strikes. They have identified cases that they wish
19 to strike from that Bellwether pool. I understand that those
20 strikes include Plaintiff Reed as one of the defendants'
21 strikes. So, with that background, I would like to hand it to
22 Mr. Nolan.

23 THE COURT: So, the essential issue is whether this
24 particular case should remain in whatever ultimately results
25 for the Bellwether trials, the list that ultimately will be

1 the Bellwether trials?

2 MS. JOHNSON: I think that is certainly one issue,
3 your Honor. I think a second issue that Mr. Nolan may wish to
4 speak to is whether independently of that Bellwether
5 framework, there would be a reason to mark out Mr. Reed's case
6 for trial.

7 THE COURT: Mr. Nolan.

8 MR. NOLAN: Thank you, your Honor.

9 Your Honor, Wayne Reed is a gentleman in Nashville
10 who, unfortunately, suffers from the disease known as ALS or
11 Lou Gehrig's disease.

12 THE COURT: He has not yet died?

13 MR. NOLAN: He has not yet died.

14 And his wife, Diana Reed, injured her neck helping
15 him as his primary caregiver. He'll wheelchair bound. And as
16 a result of that injury, she sought treatment at the Saint
17 Thomas Out-Patient Neurosurgical Center where she received the
18 contaminated epidural steroid injections. So, his wife -- and
19 they had been married for 36 years -- died at age 56 and left
20 Mr. Reed wheelchair bound, living alone, and now attempting to
21 fend for himself, and not only did he depend on her as his
22 primary caregiver, but he also depended on her income to
23 supplement his very modest income.

24 So, now, this gentleman, your Honor, is struggling at
25 home, alone and running out of money, which is why we think

1 that justice requires that his case be set for trial as soon
2 as possible.

3 There's another problem, which is that the nature of
4 his neurological disorder affects his vocal chords. So, he
5 does not speak normally now, and his vocal abilities are
6 continuing to deteriorate. So, at some point he will be
7 unable to talk about his late wife in a courtroom, and it's
8 for that reason, your Honor, that we suggest that justice
9 requires that his case be one of the Bellwether cases that is
10 designated early for trial.

11 Now, the Court is correct in recalling that when we
12 were here in June, I attempted to bring this motion up and the
13 Court said that we really couldn't address this motion until
14 the Court decided where the cases were going to be tried.

15 Now they're going to be tried here, and the parties
16 disagree across the vee about whether allowing strikes is
17 appropriate under these particular circumstances.

18 Your Honor, another important point is that early on
19 in this litigation, all the parties agree that the Wayne Reed
20 case would be treated as the lead case from a pleading
21 standpoint, and by that I mean that as far as the answers that
22 these defendants had filed are concerned, they answered the
23 master complaint, which was a national complaint, and we all
24 agree that we would pick one Tennessee case and they would
25 file an answer to this Tennessee-specific allegations in that

1 complaint and we agreed that that would be Mr. Reed's case.

2 So, it should come as no surprise to my adversaries
3 that we want his case to proceed first. There are enormous
4 equitable reasons for it to do so, and it's our very
5 respectful position, your Honor, that at some point the
6 process must yield to justice and this is one of those points.

7 Now, my adversaries have basically suggested that if
8 we're that concerned about Mr. Reed, we should simply take his
9 videotape deposition and be content to wait for whatever
10 indefinite period of time, but as this Court has observed in
11 one of its previous orders, the Court has a distaste for
12 videotape depositions, and we agree with that because there's
13 just no substitute for having live witnesses at trial.

14 THE COURT: Well, let me ask you. Even under the
15 best of circumstances, no trial is going to occur until
16 sometime maybe April, May, June, right?

17 MR. NOLAN: That's correct.

18 THE COURT: Would it not be prudent to have his
19 videotape deposition done, in any event?

20 MR. NOLAN: That may be prudent, your Honor. That
21 may be prudent. I would agree with that, but --

22 THE COURT: So, that's not an element that we really
23 need to consider. It may have to be done regardless.

24 MR. NOLAN: It might have to be done regardless and
25 we're not opposed to that, but we would suggest that having

1 his ability to testify live -- a videotape deposition would be
2 an insufficient substitute for that.

3 THE COURT: When is it contemplated that the
4 bankruptcy pot is going to start distributing? I mean, that
5 pot is independent of his claim against the Tennessee
6 defendants, is it not?

7 MR. ELLIS: Your Honor, Rick Ellis.

8 We are hopeful that the first letters approving
9 claims are going to be able to go out, hopefully, prior to
10 Christmas. If that's true, there are some lien issues
11 involved with Medicare, private liens. We're working on
12 those. If we can get those resolved quickly, there is a
13 possibility that the first payments could conceivably go out
14 maybe March of next year potentially, but I also want to add,
15 that's not going to be large sums. It's not going to be large
16 sums from the national settlement.

17 THE COURT: What is a "not large sum" for somebody
18 like Reed? Just a broad estimate.

19 MR. ELLIS: Well, those have not been finalized yet,
20 but we do have some estimates. I'm not exactly sure what that
21 category -- so, potentially 175, 200, in that range, with some
22 flexibility.

23 THE COURT: Okay.

24 MR. NOLAN: Your Honor, it's been now more than three
25 years since Ms. Reed passed, and while I appreciate Mr. Ellis'

1 efforts to move along the bankruptcy pot distribution process
2 very much, I have not heard a firm date yet as to when those
3 funds would actually be released. So, my job as an advocate
4 is to try to move his case along as quickly as I can.

5 THE COURT: I understand.

6 MR. NOLAN: I think it's also important to note that
7 part of the primary resistance that we received from the
8 defendants in setting his case for trial is the notion that
9 his circumstances are so sympathetic, that his case is an
10 outlier and would not have predictive value and, therefore, is
11 not appropriate for a Bellwether trial. Here's why I disagree
12 with that:

13 The problem with this litigation --

14 THE COURT: Why does one at the trial need to get
15 into this very sympathetic stuff? I mean, it will be her
16 claim -- or now his claim as administrator, or whatever he is,
17 and she is like other people who were injured by the drug. I
18 mean, why does the case have to be tried as super sympathetic
19 as you're giving it to me in order to get a trial date?

20 MR. NOLAN: Well, your Honor, one of the elements of
21 damages that he would be entitled to recover is the value of
22 the lost services of his wife. So, the jury would have to
23 know in order to quantify his compensatory damages about Mr.
24 Reed's circumstances and --

25 THE COURT: Well, then he is an outlier. That makes

1 him an outlier in comparison to other cases.

2 MR. NOLAN: I suggest that that's not really the
3 fundamental problem, and here's why:

4 The parties in this case -- their disagreement is not
5 over how to value cases. The problem is not what various
6 death cases might be worth or what fungal meningitis cases
7 might be worth. The problem is that the parties have a
8 fundamental disagreement, different view, about how liability
9 should be allocated in this situation, and that question isn't
10 a function of compensatory damages. It's a function of what
11 the proof is on the liability issues and it will also be a
12 function of certain rulings this Court may make on certain
13 dispositive motions. So, the Wayne Reed case will have just
14 as much predictive value on issues of how legal responsibility
15 should be allocated as any other case. Now, out of --

16 THE COURT: The defendants don't agree with that?

17 MR. NOLAN: The defendants do not agree with that.

18 THE COURT: Okay.

19 MR. NOLAN: And I would acknowledge that in terms of
20 severity of damages is concerned, the Wayne Reed case is at
21 the top end of the scale, but that's not what's holding up the
22 parties' ability to get a resolution. What's holding that up
23 is the parties are -- they just view from completely different
24 prisms the basic liability issues and those issues can be
25 sorted out in Wayne Reed's case as well as any other.

1 THE COURT: Why does that apply to Wayne Reed's case
2 more than to any other case?

3 MR. NOLAN: Why does that apply more to Wayne Reed's
4 case than to any other case?

5 THE COURT: Yes. Because of the higher damages, or
6 what?

7 MR. NOLAN: Well, I think the liability issues in
8 Wayne Reed's case are the same as any other case. They're the
9 same as any other case. So, his case --

10 THE COURT: So, the defendants have a substantial
11 disagreement concerning the responsibility, I guess, of the
12 defendants with -- amongst themselves -- or I'm not exactly
13 sure what you're saying, but from what you said before, it
14 doesn't sound to me as though Wayne Reed is any different from
15 anybody else --

16 MR. NOLAN: You're exactly --

17 THE COURT: -- as to the disagreement.

18 MR. NOLAN: You're exactly right, your Honor. Wayne
19 Reed's case is the same as to that disagreement. So, his case
20 at trial would have the same degree of predictive value as any
21 other potential Bellwether case would have.

22 So, if the goal is try a case that isn't truly worth
23 trying so that the parties can see how a jury sorts out issues
24 such as comparative fault --

25 THE COURT: Okay.

1 MR. NOLAN: -- Wayne Reed's case is good as any other.

2 MR. STRANCH: Your Honor, there's one thing I would
3 like to say. I'd be remiss if I didn't mention that the other
4 plaintiffs throughout this litigation also have very sad
5 stories. There are also sympathetic plaintiffs well beyond
6 Mr. Reed, families that were torn apart as a result of this,
7 people that lost their homes. And so, it's not an outlier
8 because he's got a sad situation, as has been suggested to the
9 Court, and I just wanted to make the point that all --

10 THE COURT: Do the plaintiffs object to Reed going
11 first?

12 MR. STRANCH: We do not object to the Reed case going
13 first.

14 THE COURT: Okay. Let me -- wait one second. Lisa.

15 (Discussion off the record at the Bench.)

16 THE COURT: I have a jury out, which has just
17 announced it has a verdict. So, I think what we should do --
18 I told them that there would be a lot of lawyers here and that
19 we would have to vacate the jury box and -- but, in any event,
20 let us hear from Tennessee and then we'll...

21 MR. TARDIO: Thank you, your Honor. Chris --

22 THE COURT: Who is going to speak? I think there are
23 some --

24 MS. GREER: Mr. Tardio can go first.

25 THE COURT: Whom do you represent?

1 MR. TARDIO: I represent the Tennessee Clinic
2 defendants, your Honor.

3 THE COURT: And you are?

4 MR. TARDIO: Chris Tardio, T-a-r-d-i-o.

5 Let me just make a few points, because I know the
6 Court has an another matter outside the door.

7 But to address what Mr. Nolan said, first off, the
8 Court has already put in place a process in an order issued in
9 July. The Court has already decided what the Bellwether
10 process is going to be.

11 So, I think, if I understand what the plaintiffs are
12 proposing, they're proposing that the Court set aside the
13 process was put in place and allow the Reed case to move to
14 the front of the line.

15 THE COURT: I think what the plaintiffs are proposing
16 is to not eliminate Reed's case. Reed would be in the mix, in
17 any event, subject to being eliminated by defendants, and I
18 think what they're asking is not to have him eliminated.

19 MR. TARDIO: Well, that would require the Court to
20 set aside the process put in place in July that explicitly
21 allows strikes on either side.

22 To the extent that -- so, in our view, this issue has
23 already been decided. The Court has already put in place a
24 process that allows each side to strike certain cases, and
25 there's good policy behind that, because it strikes cases at

1 the polar opposite ends of the spectrum and gives us a
2 representative case.

3 So, if the Court's goal -- and I believe it is, but
4 if the Court -- if the Court's goal is to put in place a
5 process that identifies a representative case to be tried in
6 early or mid 2016, the Reed case is not a representative case,
7 and there's no reason to depart from the process --

8 THE COURT: Why is it not representative?

9 MR. TARDIO: Well, Ms. Reed is younger than the
10 average plaintiff. She was married. The unique circumstances
11 that we've talked about here make it unique. She was making
12 more money than the average plaintiff. All of these elements
13 put her outside the middle of the spectrum and it makes her an
14 outlier.

15 THE COURT: Why do we have to have a middle of the
16 spectrum? Why can't we have an outlier for plaintiffs and an
17 outlier for defendants?

18 MR. TARDIO: Because I don't think that achieves the
19 purpose behind trying a representative case, to realize a case
20 -- or to try a case and get a verdict that allows the parties
21 to predict what will happen in the next 150 cases or if you
22 want to apply it across the entire MDL to see what's going to
23 happen in the next 700 cases. It doesn't -- trying an
24 unrepresentative or nonrepresentative case does not allow the
25 parties to take that verdict and predict what's going to

1 happen down the road.

2 THE COURT: Okay.

3 MR. TARDIO: Thank you, your Honor.

4 MS. GREER: Your Honor, Marcy Greer for the Saint
5 Thomas Entities. Just a couple of quick points to add to Mr.
6 Tardio's.

7 You asked how is this an outlier versus a
8 representative case. It's an incredibly sympathetic case. I
9 mean, these facts are going to get before the jury and Mr.
10 Reed's condition. It's going to overpower the law in this
11 case and it's going to give a result, most likely, that is not
12 predictive.

13 In addition, she was injected with cervical
14 injections, which is very different from most of the
15 plaintiffs in these cases who had epidural injections. So,
16 there are factors that we haven't even had a chance to go into
17 because we thought this motion had been decided and the Court
18 had set up strikes and we actually struck this case. We
19 exercised our strikes before the deadline and struck this case
20 and another case. So, they're basically asking you to
21 reconsider the process, the strikes, and everything, and put
22 this case to the front of the line and it's going to derail
23 all of the attention from all of the other cases.

24 As Mr. Stranch pointed out, there are a lot
25 sympathetic plaintiffs here and they're all having to wait,

1 and the fact that they've chosen to put one forward in favor
2 of another is not relevant to whether or not they're
3 representative, and that's the real goal here. We've really
4 got to get representative cases to trial, and we're willing to
5 try cases. You know, if that's what it has to be to get this
6 information, we're willing to do it.

7 We do see the allocation in the fault and the
8 liability issues very differently, but the only way to know
9 how those issues get tried and what juries will do with that
10 information and what the law is, is to have cases that are in
11 the middle of the road. That's the whole reason that we've
12 laid out this process that Judge Fallen has put forward as
13 being the way to get to representative cases because we want
14 to avoid the situation where all the time has been wasted. We
15 don't have a lot of time.

16 At this rate, you know, March does not seem realistic
17 for a single trial, and I think your Honor put your finger on
18 it. I mean, we need to take a deposition of Mr. Reed to
19 preserve his testimony and then figure out what makes sense
20 for the entire litigation, all of the plaintiffs in this case.

21 THE COURT: All right. Let me take, I'm sorry, a
22 brief recess here so I think take this jury's verdict and then
23 we'll resume.

24 (Recess taken.)

25 THE COURT: Thank you for your accommodation. The

1 jury thanks you.

2 Are we done with Mr. Reed or does anyone wish to add
3 anything to the arguments for Mr. Reed?

4 MR. STRANCH: Your Honor, if I may briefly.

5 THE COURT: Yes.

6 MR. STRANCH: This will tie into some issues that we
7 have kind of touched on now and will touch on later or we may
8 just want to deal with them now, which is the competing
9 proposals for the Bellwether process.

10 You heard from the defense lawyers a minute ago that,
11 you know, the goal is to get a perfectly average middle-of-
12 the-road case, and the problem with that, your Honor, is --
13 for example, the defendants' picks that they have put before
14 the Court as their Bellwether selections, pretty much all of
15 them, according to the defendants, have significant notice
16 problems under Tennessee law that would prohibit them if the
17 defendants are right from ever seeing a jury, which would --

18 THE COURT: I thought this was for trials.

19 MR. STRANCH: This --

20 THE COURT: Why would we have cases that aren't going
21 to go trial?

22 MR. STRANCH: Well, if the defendants are right about
23 the notice issues, then a bunch of those cases would never
24 make it to trial, and we would submit to the Court that that
25 would make those cases outliers, and that's one of the reasons

1 why we've made our Bellwether proposal that we did to the
2 Court, which takes out the strikes and it narrows the pool
3 down to certain types of cases that will be most instructive
4 for the parties.

5 THE COURT: Does that suggest that the protocol that
6 we had originally put out is inadequate?

7 MR. STRANCH: The way the protocol is being used, it
8 would be inadequate. It would leave us with no death cases
9 and no fungal infection cases being tried for a Bellwether
10 process, possibly.

11 THE COURT: So, what do counsel suggest I should do?

12 MR. STRANCH: We've proposed to the Court in our
13 Bellwether proposal that we narrow the cases to four from each
14 side and that there be no strikes and that those four cases
15 would be basically the death or serious fungal -- or fungal
16 infection cases, and then we would work up those cases, have
17 them trial ready on the same schedule that the Court has
18 already suggested, and the parties would then propose to the
19 Court of these eight cases, these are the ones that we think
20 should be tried and why we think they would be the most
21 helpful as a Bellwether, and then the Court would select who
22 goes to trial at that time, and then there would be a second
23 Bellwether pool following behind that that would be for the
24 non-fungal infection, the lesser damage cases, basically,
25 because what's really causing a problem here is the question

1 of, Is big Saint Thomas going to be vicariously liable or not?
2 Can we bring a products claim here or not? And once those
3 questions are answered --

4 THE COURT: But does it take a trial to answer those?

5 MR. STRANCH: Well, we filed a partial motion for
6 summary judgment on a product seller issue which we think if
7 the Court grants that would help in valuing these cases
8 dramatically, but we may --

9 THE COURT: That's not ripe for decision yet?

10 MR. STRANCH: That is not yet ripe for decision, but
11 the position we are in, though, your Honor, is -- you know,
12 some of the issues can't be worked out pretrial, such as was
13 big Saint Thomas' conduct such that they're vicariously liable
14 for what happened at STOPNC.

15 THE COURT: And that's a purely legal question raised
16 in the summary judgment motion?

17 MR. STRANCH: No, your Honor. That's something that
18 a jury is going to have to decide based upon the facts.

19 THE COURT: Ms. Greer.

20 MS. GREER: Your Honor, actually, the agency issues
21 are going to be raised on summary judgment by us and we
22 believe they are -- there are some -- a lot of issues that can
23 be narrowed down pretrial as well, but the real point here --
24 and I'd like to take a second to just context this as to where
25 we were.

1 On July 9th and then again in October, the Court has
2 issued orders deciding the Bellwether process. At one of the
3 hearings we were asked to go back and come up with a schedule
4 based on the Bellwether, and what the PSC came back with was a
5 reconsideration of the entire process to move away from what
6 the Court has ordered in the two orders and to basically do
7 away with strikes, set the cases for trial, et cetera, in this
8 sequence.

9 We believe that the Court has spent a lot of time
10 looking at these issues and the process that was adopted in
11 those two orders makes sense and needs to be followed, and as
12 to --

13 THE COURT: Excuse me. I can't say that it was such
14 a -- I mean, if what I hear now is the case, that the
15 defendants are putting into the Bellwether process cases that
16 are either not going to go to trial or that are certainly not
17 representative of the cases, then that doesn't make sense, nor
18 does it make sense if the plaintiffs were to do the same.

19 MS. GREER: Well, your Honor, I don't think that's a
20 fair characterization at all. First of all, I'm not sure
21 where the statement that there would be no infection cases if
22 we're allowed to exercise our strikes would be. That's not
23 the case.

24 The death cases are 12 percent of the census of
25 Tennessee plaintiffs. They are a small minority. There's a

1 huge percentage of fear cases that they don't want to see the
2 light of day in a courtroom where there's no physical injury,
3 but the fear that something could happen in the future. So,
4 we are trying to get more towards the middle.

5 And as to the notice issues, those issues were
6 specifically put off at the plaintiffs' request until the
7 individual cases rather than trying to address them on a
8 global basis. So, there are notice issues that we have
9 raised. We don't know how they're going to come out. The
10 Court has not ruled on those notice issues.

11 We did not put cases into the Bellwethers that we
12 think we're going to get out on notice issues. We put cases
13 into the Bellwethers, the ones that we chose, and we spent a
14 lot of time looking at this, that we thought would be
15 representative and fair and be down the middle. So that if
16 there are verdicts, we would be in a position to make some
17 values. With every verdict you have to make adjustments. You
18 have to look at it, because each case is somewhat different,
19 but we were looking for mainstream cases so that the parties
20 could get towards the middle, and that's the process that the
21 Court put into place and we are simply trying to follow.

22 THE COURT: Okay. So, the question before me today
23 is whether Mr. Reed goes on to the list by hook or crook, or
24 otherwise, right?

25 MR. STRANCH: Fair enough, your Honor.

1 THE COURT: Apart from that, there appears to be some
2 considerable difference between the parties as to what that
3 process is all about and how it should be executed, right?

4 As to the second, do counsel have a suggestion as to
5 how I should do that other than, more or less, arbitrarily?

6 MR. STRANCH: Yes, your Honor. We've proposed that
7 in our scheduling --

8 THE COURT: Just four.

9 MR. STRANCH: -- that we filed, that each side would
10 pick four. There would be no strikes. We would work those
11 eight cases up. We would present to the Court arguments as to
12 why we think which case should be tried, and the Court would
13 then select which ones go to trial, and that is a manageable
14 number of cases to get ready for the end of March, early April
15 trial date, and it would also let us focus on the cases that
16 we believe will be most instructive in setting a value and
17 valuing claims and also determining whether there is liability
18 or not.

19 THE COURT: And you want to go forward with what you
20 perceive to be the existing protocol?

21 MS. GREER: That's correct, your Honor, and we need
22 -- I mean, if you just look at what's happening now, we have
23 not had a single plaintiff's deposition yet. We've been
24 trying to schedule those. There's been delays with that.
25 Expert reports have not been designated on a common level,

1 much less a specific level. I mean, March, April is going to
2 be very difficult to do.

3 Our proposal is to get to four Bellwethers and finish
4 working them up for trial, and I think that can be done more
5 efficiently, but the process is important because it should
6 get to those --

7 THE COURT: Okay. So, I need to pick whether the
8 process or amended process that the plaintiffs suggest, four
9 from each side, no strikes, and you say that we already have a
10 process and I should stick with that?

11 MS. GREER: Yes, your Honor.

12 THE COURT: Okay. So, that's what I have to do.

13 Anybody want to submit anything else to me so as to
14 focus me further?

15 (No response.)

16 THE COURT: So, I --

17 MS. JOHNSON: Your Honor, the plaintiffs are content
18 with the submission that we have made so far.

19 THE COURT: Okay. And defendants as well?

20 MS. GREER: Yes, your Honor. We've responded to that.

21 MS. JOHNSON: I will say this, your Honor, if I may.
22 I think everyone is in agreement that the goal here is to try
23 the cases that will help resolve the MDL. From the PSC's
24 perspective, that means trying death cases and fungal
25 infection cases. We don't see trying fear cases as driving

1 resolution of this MDL. It may eliminate some swath of cases,
2 but it's not really going to bring us to where we need to be.

3 I also observed -- and I think having the jury come
4 in the middle of the hearing had me focus on this. One of the
5 questions that I hear the Court asking is, how are we going to
6 make sure that the verdict is actually predictive and helpful
7 across the swath of cases, and I -- it occurs to me that one
8 conversation I expect that the parties and also the Court will
9 have, probably ongoing between now and the spring, is what the
10 verdict slip actually looks like and if there are ways to
11 structure that that make particular outcomes more clear or
12 have more bearing on certain types of cases.

13 So, it is not as though simply picking the cases is
14 determinative of the outcome. There are also ways to
15 structure that verdict such that you can elicit information
16 that may be helpful across the board.

17 THE COURT: I'm not exactly sure I follow the verdict
18 slip issue, but I gather you're concerned.

19 Okay. Thank you very much.

20 So, now we go to Part B.

21 MS. JOHNSON: Yes, your Honor. Mr. Gottfried will
22 address the status of the bankruptcy.

23 MR. GOTTFRIED: Good afternoon, your Honor. I just
24 wanted to give you a brief status report.

25 The post confirmation officer has completed his

1 review of the non-tort unsecured claims. He has filed with
2 the bankruptcy court notice of which claims are going to be
3 allowed, which claims are being disallowed pursuant to the
4 statute.

5 He has filed three omnibus objections to categories
6 of claims. Those have all now been set for hearing by Judge
7 Boroff. There'll be one group that will be heard on December
8 16th of this year, and the other two omnibus motions will be
9 heard on January 6th of next year. Those involve things like
10 the indemnity and contribution claims, the medical liens
11 asserted against NECC, the late-filed claims, release claims
12 and sufficient document claims. So, the process is moving
13 forward in an expeditious and appropriate manner.

14 THE COURT: Good. Thank you.

15 MS. JOHNSON: No. 3, the status of the insurance
16 declaratory judgment actions. Mr. Stranch will address what's
17 been going on in Tennessee.

18 MR. STRANCH: Your Honor, the magistrate judge had
19 ruled last time that the question of whether a products claim
20 can be brought against a doctor or a clinic, to certify that
21 question to the Tennessee Supreme Court. We appealed that
22 order to the district court judge who upheld the magistrate's
23 order.

24 So, the process going forward is in -- by December
25 we're going to have either an agreement on the certification

1 that's going to go up to the Court or competing proposals, and
2 then those will be filed with the Tennessee Supreme Court.

3 THE COURT: Does that court take as long as our
4 Supreme Court Judicial Court to decide cases?

5 MR. STRANCH: Your Honor, it may even take longer
6 because we don't even have a full court right now.

7 And one thing that is key, though, is they don't have
8 to take the question just because it's certified, and we just
9 had a question that was certified to the Tennessee Supreme
10 Court and we waited about six months to get a decline from the
11 Supreme Court. They do not grant those as a normal course to
12 take them. They're very selective.

13 And so, we may get six months down the road and the
14 Court may deny it. We may get a year down the road and they
15 may deny it, and that's just where we stand.

16 Magistrate Brown indicated over the phone that if the
17 Supreme Court did deny the certification, he would be inclined
18 to stay the case until after the MDL has resolved itself, but
19 it's not -- but he was also very clear that he was just
20 thinking out loud about that.

21 THE COURT: That's always a mistake.

22 (Laughter.)

23 MR. STRANCH: So, that's the status of the
24 declaratory judgment action.

25 THE COURT: Thank you.

1 MS. JOHNSON: That brings us to No. 4, the status of
2 discovery. We wanted to bring to the Court's attention that
3 we expect to have filed shortly an agreed-upon motion to
4 extend the common discovery deadlines in the Premier New
5 Jersey cases. I understand that counsel has, I believe,
6 agreed to an extension of about 60 days of the common
7 discovery deadline. That brings us to -- I think January 22nd
8 is the date they're considering. That would bring the Premier
9 common discovery deadline in line with the Box Hill common
10 discovery deadline. So, that would effectively shrink us from
11 three tracks to two tracks. I expect that to be filed this
12 week, but, in any event, before the next status conference.

13 In terms of Court rulings, I think it's worth
14 mentioning -- I won't drag anyone through all eight orders
15 that have been issued. We will all say thank you. That was a
16 tremendous amount of work done by this Court in the last 30
17 days, primarily by Judge Boal, and we appreciate that.

18 I will mention one thing that happened this week, as
19 it is the most current, which is there were motions to prevent
20 the deposition of certain NECC employees from going forward,
21 and the short-term resolution of that is that the deposition
22 did not go forward. Two depositions of both Connolly and
23 Notarianni have been -- I'm not sure they're formally stayed,
24 but have been put off, in any event, according to the Court's
25 order.

1 And we do understand -- the Court may find this
2 interesting. We do understand from -- well, we understand
3 that both of those employees, one of whom is an NECC employee
4 and one of whom is a medical sales management sales trainer,
5 are not expected to take the Fifth Amendment, which I think
6 the government made clear in the papers briefing us.

7 THE COURT: So, why were they -- the depositions
8 postponed? You mean, they apparently have nothing to do with
9 the criminal case or do they?

10 MS. JOHNSON: The U.S. Attorney's Office asked that
11 the deposition be stayed, I think was their formal term.

12 That brings us to the status of the litigation track,
13 your Honor, No. 5, and the Court entered yesterday or this
14 morning -- I've forgotten -- an order regarding the procedure
15 for --

16 THE COURT: Day before yesterday.

17 MS. JOHNSON: Day before yesterday. Thank you, your
18 Honor.

19 (Discussion off the record at the Bench.)

20 THE COURT: Well, I did it two days ago.

21 COURTROOM DEPUTY CLERK URSO: Right.

22 THE COURT: Ms. Urso just did it today.

23 MS. JOHNSON: Yes. Thanks to both of you.

24 We did have one question about that, your Honor. The
25 Court had adjusted the dates in that schedule, but it appears

1 that there is a date in the second paragraph where the date
2 given is November 7th, which has passed. So, we would ask
3 that the Court, likewise, adjust that November 7th date to the
4 November 19th, as the Court had done above. I have a copy of --

5 THE COURT: Where is it?

6 COURTROOM DEPUTY CLERK URSO: I have it, too. I have
7 the original, actually. The Judge is looking at it.

8 THE COURT: This looks like the original.

9 COURTROOM DEPUTY CLERK URSO: It is. She's asking
10 for --

11 THE COURT: Oh, November 7th.

12 COURTROOM DEPUTY CLERK URSO: To do it to the 19th,
13 like you did up here.

14 THE COURT: Okay. Done.

15 MS. JOHNSON: Thank you, your Honor. And the PSC
16 will be sure to circulate that to all plaintiffs' counsel
17 promptly.

18 COURTROOM DEPUTY CLERK URSO: I'm not going to
19 re-enter the order again.

20 MS. JOHNSON: I don't think that's -- I don't think
21 that's necessary.

22 COURTROOM DEPUTY CLERK URSO: Okay.

23 MS. JOHNSON: Thank you.

24 And then I think, your Honor, we've addressed Items
25 5-B, C and D in the context of addressing the Reed motion,

1 unless counsel for either party feels differently.

2 THE COURT: No? Okay. Then we go to E, right?

3 MS. JOHNSON: Yes. And this is...

4 MR. STRANCH: Your Honor --

5 THE COURT: What's the issue with respect to this?

6 MR. STRANCH: As a bit of quick background, there are
7 two clinics -- or three clinics in Tennessee. The majority of
8 the cases are against the Saint Thomas Clinic. There is a
9 smaller clinic called Specialty Surgery Center that's in east
10 Tennessee that also has cases against them. This relates only
11 to the Specialty Surgery Center, which is the other clinic in
12 Tennessee.

13 They had a business manager Calisher that we learned
14 about once depositions started this past fall -- I mean, this
15 past winter, and we've moved to add them as a defendant based
16 upon what discovery has shown.

17 Mr. Moran who is representing Calisher has -- is
18 speaking with his client about whether they're going to oppose
19 the motion to amend and file on that or whether they're going
20 to allow it and then just file a Rule 12 motion after that.
21 The time has not come to answer that, but that's what's going
22 on there, and we have done some discovery of Calisher itself
23 already. So, it should not slow down the schedule that
24 Specialty Surgery is on.

25 THE COURT: Okay.

1 MR. STRANCH: And that's --

2 THE COURT: So, at the moment, there's nothing to do.

3 MR. STRANCH: At the moment, there's nothing to do,
4 but that is coming, your Honor.

5 THE COURT: Well, it may be by agreement.

6 MR. STRANCH: Hopefully so, your Honor.

7 MS. JOHNSON: And No. 6, your Honor. I wanted to
8 give the Court an update on proceedings in Michigan state
9 court.

10 We're pleased to announce that settlement has been
11 reached in the Michigan Pain -- MPS case, which is Michigan
12 Pain Specialists. That is a class settlement for \$10.5
13 million. The Court has entered preliminary approval already.
14 The final approval hearing is set for March 26th, and we will
15 update the Court about that as it goes on.

16 The second update is that a northern Michigan jury in
17 Travers City, Michigan found a northern Michigan pain clinic
18 called Neuromuscular Rehabilitation Center, did not violate
19 the standard of care in their community on medical malpractice
20 claim. That case and verdict did not address product
21 liability claims. It also did not include allegations of fake
22 names, such as Mickey Mouse, and I understand there is either
23 an appeal in process or an expected appeal from that verdict.

24 THE COURT: But that matter is not here?

25 MS. JOHNSON: That matter is not, your Honor. We

1 only thought by -- as we were updating the Court on the MPS
2 settlement -- and you may recall -- actually, forgive me, your
3 Honor. I forget whether that was when the case was still with
4 Judge Saylor, but at a point in time MPS participated in a
5 mediation program here and we were not able to resolve things
6 here. So, we wanted to inform the Court that that resolution
7 has been reached elsewhere.

8 THE COURT: Thank you. Pro se.

9 MS. MARTIN: Thank you, your Honor.

10 There is no news from the pro se world this month.
11 So, that is the entire report.

12 THE COURT: Thank you.

13 MS. JOHNSON: I do think Ms. Dougherty wanted to
14 speak about some pro se work in the clinic settlements.

15 MS. DOUGHERTY: Good afternoon, your Honor.

16 I just wanted to update you with respect to the pro
17 se facilitators that were appointed to assist with the clinic
18 settlements.

19 We had the generosity of Professor Kevin Outtersen
20 from Boston University and two students, Louis Osterman and
21 Christian Rogerson, who helped many of the victims of this
22 tragedy who had claims against High Point, Inspira and Insight
23 who settled, work through the claim forms, get those filed,
24 and ensure that they were able to make a valid claim.

25 So, we appreciate all the work that was done by

1 Boston University students and Professor Outtersen. It was
2 really -- they really did an excellent job and were really
3 helpful to a lot of pro se claimants out there. So, we just
4 want to thank them publicly.

5 THE COURT: And I bet they learned a lot.

6 MS. DOUGHERTY: Yes, absolutely.

7 THE COURT: Thank you.

8 MS. DOUGHERTY: You're welcome.

9 THE COURT: So, the next scheduled is December 17th
10 and January 14 and 15, and I think that's okay.

11 COURTROOM DEPUTY CLERK URSO: December 17th. And
12 then January 14?

13 THE COURT: Yes. January 14th For us. January 15th
14 for Judge Boal.

15 COURTROOM DEPUTY CLERK URSO: Yes.

16 THE COURT: Okay. So, those are the dates.

17 MAGISTRATE JUDGE BOAL: I can also add on December
18 17th a morning session at 11:30.

19 MS. JOHNSON: Thank you, your Honor.

20 Would it be possible to schedule the February
21 conference at this time?

22 COURTROOM DEPUTY CLERK URSO: Yes.

23 MS. JOHNSON: For the second week -- excuse me?

24 THE COURT: Why do we need to go out that far?

25 MS. JOHNSON: We certainly do not, your Honor. It's

1 sort of our practice to add one as we go, but we do not need to.

2 THE COURT: We can do it.

3 MS. GREER: Your Honor, it helps for us for planning
4 purposes, those of us who have to travel, if we could go ahead
5 and get dates on the calendar.

6 THE COURT: I haven't scheduled my spa vacation yet.

7 (Laughter.)

8 MS. GREER: Oh, that comes first.

9 THE COURT: Just kidding.

10 MR. STRANCH: Will that place be warmer than Boston?
11 Can we meet there instead?

12 THE COURT: It's interesting. Off the record.

13 (Discussion off the record.)

14 COURTROOM DEPUTY CLERK URSO: Did you say a date?
15 I'm sorry.

16 MS. JOHNSON: The second week. I apologize.

17 COURTROOM DEPUTY CLERK URSO: Yes.

18 MS. JOHNSON: Thursdays seems to have worked well
19 recently.

20 COURTROOM DEPUTY CLERK URSO: Okay.

21 MS. GREER: The first week is the ABA midyear
22 meeting, which may impact some people.

23 COURTROOM DEPUTY CLERK URSO: It wouldn't, by any
24 chance, be a good day on the 18th for that, would it? If
25 not -- if it's the 11th, I'll change the hearings that I

1 already have set there.

2 MS. JOHNSON: I think the 18th would work for
3 plaintiffs.

4 COURTROOM DEPUTY CLERK URSO: Would the 18th work
5 for --

6 THE COURT: Is the 11th in conflict with the ABA?

7 MS. GREER: No, your Honor.

8 THE COURT: So, is the 11th possible?

9 COURTROOM DEPUTY CLERK URSO: Well, we have three
10 hearings on that, Judge. I was just seeing if we could do the
11 following week, but if it's not, I'll change the 11th date.

12 MS. JOHNSON: Ms. Dougherty just reminded me that the
13 18th school vacation week.

14 COURTROOM DEPUTY CLERK URSO: All right. So, we'll
15 do the 11th at 2:00 and I'll change the other hearings.

16 MS. JOHNSON: Thank you.

17 COURTROOM DEPUTY CLERK URSO: Okay.

18 MAGISTRATE JUDGE BOAL: And I'll schedule a session
19 in the morning at 11:30.

20 MS. JOHNSON: Thank you, your Honor.

21 THE COURT: Now, Item C, the discovery-related
22 motions are Judge Boal's.

23 MS. JOHNSON: Yes, your Honor.

24 In terms of the "Other Motions" heading we have
25 there, 11 simply lists the choice of law briefing that has

1 previously been done. There is no additional briefing.

2 THE COURT: I have that and I will decide it soon.

3 MS. JOHNSON: That brings us to briefing in progress,
4 and there is one issue that I would like to alert the Court
5 to. There has been briefing on -- the PSC has filed a motion
6 seeking protective order to prevent defendants' efforts to
7 take deposition by written questions in both the Premier cases
8 and the Box Hill cases. Those are on slightly different
9 briefing tracks and, technically, the Premier motion is ready
10 for a decision, but we thought it made sense to address that
11 issue because it is fairly cross-cutting once before the Court
12 and we were hoping to address that at argument next month, if
13 that works for the Court.

14 MAGISTRATE JUDGE BOAL: Yes, I will put it on for the
15 11:30.

16 And I actually had a question on 14. I know that
17 that was withdrawn. I think it was yesterday or maybe this
18 morning. But I guess it relates to the discovery-related
19 motions in nine and ten. There were overlapping issues.

20 So, I was wondering if in any way -- I guess it's
21 really from Mr. Tardio's perspective whether -- I assume there
22 was some resolution, which is why the motion was withdrawn. I
23 was wondering if NECC did produce materials and if so, what
24 effect that had on the motions on nine and ten.

25 MR. TARDIO: I think that the motion that the Court

1 is referring to -- or the withdrawal of the motion was the
2 Saint Thomas Entities, I believe.

3 MAGISTRATE JUDGE BOAL: All right.

4 MS. JOHNSON: Yes, it was.

5 MR. SCHRAMEK: Adam Schramek for the Saint Thomas
6 Entities.

7 Yesterday we received from the NECC trustee through
8 an agreement, we received some of the marketing materials we
9 were looking for, and I'm told that the videos are in the mail
10 and should be waiting for me when I get back to my office
11 hopefully tomorrow. Yes, tomorrow.

12 Accordingly, we withdrew the motion against NECC
13 pursuant to that agreement, and we are currently -- when I
14 look at the videos tomorrow and see exactly what I have, we
15 may be filing some additional motions to -- with respect to
16 these two. So, they are currently pending because we just
17 haven't had time --

18 MAGISTRATE JUDGE BOAL: Because it seemed like they
19 were overlapping with the --

20 MR. SCHRAMEK: That's right.

21 So, we hope to file something in the next day or so
22 advising the Court of whether or not the materials we got from
23 NECC, in fact, have satisfied nine and ten. Again, I haven't
24 looked at the videos yet. I was downloading them on the plane
25 last night for the deposition this morning. So, I just need

1 to look at it tomorrow and we're going to get something on
2 file with the Court shortly.

3 MAGISTRATE JUDGE BOAL: All right. Thank you.

4 MR. GOTTFRIED: But I do believe that all the issues
5 with NECC have been resolved consensually and, once again, the
6 trustee --

7 MAGISTRATE JUDGE BOAL: There's nothing pending
8 before me.

9 MR. GOTTFRIED: That's correct.

10 MAGISTRATE JUDGE BOAL: So, I would agree with you at
11 this point.

12 MR. GOTTFRIED: Perfect. Thank you.

13 MS. JOHNSON: I believe that brings us, then, to No.
14 15, and that's just a reminder that the PSC has filed the
15 motion for partial summary judgment that was referred to
16 earlier today involving the product claims.

17 THE COURT: Is there objection to the emergency
18 motion to extend time?

19 MS. JOHNSON: We did not object to the extension
20 sought there, but I believe the time has elapsed and no
21 opposition has been filed.

22 MR. STRANCH: Yes, your Honor.

23 What's at stake on this issue is we had offered when
24 the defendants asked for an extension of time to respond to
25 it, an extension that would give them an additional 15 days

1 basically to work on the motion that would allow us to then
2 have that motion heard in December, because it would simplify
3 the trial preparation significantly if that motion is granted.
4 And so, we felt that it was important to have that heard
5 earlier rather than later.

6 The defendants didn't want to have it heard until
7 January at the earliest or February, and we said that's just
8 too late for us because it will complicate things
9 unnecessarily. It will impact experts that are disclosed and
10 other matters depending upon the --

11 THE COURT: I can't imagine why anybody wants to work
12 on this motion over Christmas.

13 MR. TARDIO: I don't know that we want to work on it
14 over Christmas. We simply asked for an extra two weeks on top
15 of what the plaintiffs were willing to give us, which was
16 still less than we agreed earlier when deciding how long they
17 would have to respond to our motion.

18 THE COURT: So, when do you want to respond?

19 MR. TARDIO: I think the difference in opinion is
20 between November 20th and December 2nd or 3rd, somewhere
21 around then.

22 THE COURT: If they respond on December 3rd, why
23 can't it be heard on December 17th or whatever the next date is?

24 MR. TARDIO: Well, one issue is we -- our response
25 will include a cross-motion on the same issue, which if I

1 understand --

2 THE COURT: Well, it will be effectively briefed
3 because they have filed a motion on an issue. You have
4 responded and now you ask to have --

5 MR. TARDIO: That's fine. I just wanted to alert the
6 Court that that would be the procedural posture.

7 MR. STRANCH: Your Honor, when could we get in our
8 response to their cross-motion? When would the Court like --

9 THE COURT: If they respond by December 3rd, then --
10 and the next meeting is December 17, if you can respond by
11 December 16th, we'll have a chance to look at it --

12 MR. STRANCH: Okay.

13 THE COURT: -- for the 17th.

14 MR. STRANCH: Okay.

15 THE COURT: So, 12/3 for defendant and 12/16 for
16 plaintiff's response, okay.

17 MR. STRANCH: Thank you.

18 MR. TARDIO: Your Honor, let me make one note,
19 please, the issue --

20 THE COURT: Now that I decided, you're not going to
21 make it more complicated and make it all impossible?

22 MR. TARDIO: It may make the Court's job easier.

23 THE COURT: Really?

24 MR. TARDIO: The motions -- or cross-motions will
25 address the product-liability issue, which, as we heard

1 earlier, is set at least to, hopefully -- that's a mistake
2 because Mr. Stranch has said the Supreme Court will take it in
3 Tennessee. I think they will and I hope they do.

4 The Court in ruling on these cross-motions will be
5 asked to predict what the Tennessee Supreme Court will do.
6 So, I don't know if we'll file a formal motion to stay the
7 Court's ruling on our cross-motions for summary judgment, but
8 they do tie together and the issue the Court will be asked to
9 -- this Court will be asked to decide will, presumably,
10 hopefully, be on its way to the Tennessee Supreme Court.

11 THE COURT: Well, if I decide not to wait for the
12 Court, then that Court will have some additional stuff to work
13 with.

14 MR. TARDIO: Right.

15 THE COURT: Okay. That brings us to 16.

16 MS. JOHNSON: 16, 17 and 18 have been pending. They
17 are not completed. They're ongoing. So, I think we can jump
18 to 19, and on 19, really, we wanted to alert the Court that we
19 expect that this motion will be argued at the next status --
20 rather, we would ask that this motion be argued at the next
21 status conference.

22 THE COURT: That would be on the 17th, right?

23 MS. JOHNSON: Yes.

24 THE COURT: Is there anything else that anybody wants
25 to bring to the attention of either Judge Boal or me?

1 MR. STRANCH: Yes, your Honor.

2 We're going to be bringing motions to compel against
3 Specialty Surgery Center and Dr. Lister. I'm giving the Court
4 this information so that we can, hopefully, get this scheduled
5 quickly. I can tell Judge Boal is excited. We're going to be
6 asking to re-depose two of the individuals. That's Dr. Lister
7 and Jean Atkinson.

8 As I previewed in the last hearing, we discovered
9 that the drug formulary that was provided to us as being the
10 drug formulary in effect in 2012 was not the drug formulary
11 that was actually in effect in 2012, and that the medication
12 that was used on the patients in this litigation was not on
13 the actual drug formulary that was in effect when the
14 injections were done, and we discovered that in April of 2013,
15 after the litigation process had started, after litigation
16 hold letters had gone out, that there had been a change made
17 to the drug formulary to add DepoMedrol, which is the brand
18 name for the drug at issue here, to the drug formulary saying
19 that it could then be used within their clinic, and we want to
20 depose Dr. Lister and Jean Atkinson, who is the head nurse,
21 over these changes that were made to the formulary after
22 litigation started.

23 And there will also be a motion to compel over what
24 to search, because the defendants are taking the position that
25 they don't have to add in searches from 2013. They don't have

1 to go do another document search to try to find all the emails
2 and everything around this change that was made.

3 And this is an important issue that the Court is
4 going to have to consider because at the end of the day, we're
5 going to be saying our economic caps, our punitive damage caps
6 in Tennessee do not apply to this case because they altered
7 documents in this case, and that's one of the exceptions. And
8 so, we're going to need full discovery over that, and so far
9 we're being told no, we're not going to give it. And so, that
10 issue is coming and it's important and we're going to need to
11 get that heard by the Court quickly so that we can get that
12 done and get those cases ready for trial as well.

13 THE COURT: But there is not yet a motion?

14 MR. STRANCH: There is not yet a motion. It's going
15 to be filed -- we have to wait until they formally respond and
16 say we're not doing this. They've already told us that, but
17 we have to wait until then. There will be very shortly filed
18 the motion on the re-depositions as well.

19 THE COURT: All right. So, we will patiently wait.

20 MR. STRANCH: Thank you, your Honor.

21 MR. SCHRAMEK: Your Honor, there is other thing I did
22 want to raise, which is when we submitted our kind of
23 competing Bellwether schedules, that was over 30 days now, and
24 in the interim, I think we've all realized with holiday
25 schedules and trying to get witnesses to come and the number

1 of depositions that are going to be required in the individual
2 cases -- it's not just the plaintiff. It's often a spouse.
3 We're going to find out at those depositions who else they
4 intend to testify to. We haven't gotten to treating
5 physicians either for each Bellwether case that is in place.
6 I think it's become pretty obvious to both parties, both
7 sides, that we're going to need more time in order to conduct
8 that individual discovery, and we were trying to fit it into
9 this Court's February 28th or so deadline to have all
10 discovery completed, but, your Honor, it's simply not
11 realistic. I just don't see how we're physically going to get
12 it all done.

13 So, we will likely be asking the Court -- or filing a
14 supplemental calendar. I think I've heard the Court mention
15 earlier, you know, spring, you know, or a little bit into
16 summer, maybe to June, pushing it out because there is simply
17 so much to be done in order to get it all done, and right now
18 we asked about two and a half weeks ago for, you know, a
19 deposition schedule for all the plaintiffs, for all the
20 spouses, and we haven't even gotten the treaters and it's been
21 about two weeks and we just yesterday got some dates for the
22 first time for a small part of that.

23 I understand with the holidays, it's hard to get
24 folks scheduled. I understand they're working with a lot of
25 attorneys, but we are in a position of simply not having

1 enough time to get all the individual case discovery done.
2 We're still -- by agreement, we've extended common discovery.
3 We're doing common discovery by agreement now into early --

4 THE COURT: So, at the moment there's no issue, right?

5 MR. SCHRAMEK: I'm sorry?

6 THE COURT: At the moment there is no issue.

7 MR. SCHRAMEK: Well, I just wanted to advise the
8 Court, as Mr. Stranch did, that that is coming, yes, your
9 Honor.

10 THE COURT: Well, Judge Boal can't wait.

11 MR. STRANCH: Your Honor, we're happy to stay with
12 the current schedule and, of course, if the Court adopts our
13 Bellwether schedule, that will cut down on the number of cases
14 that need to be worked up that would allow us to keep to the
15 schedule that the Court has already put in place.

16 MR. SCHRAMEK: And one of the issues we have, your
17 Honor, is until we take the plaintiff's deposition, you often
18 don't discover some of the things that make a case an outlier,
19 and that's why the original process was we take the
20 plaintiff's deposition, we take the spouse, you know, we issue
21 our strikes, and then we continue discovery on the remaining
22 cases. So, that's where we have a little bit of a chicken and
23 egg issue going on here.

24 THE COURT: Ms. Johnson, did you want to say
25 anything?

1 MS. JOHNSON: No, your Honor.

2 THE COURT: Just a precaution to get the microphone.

3 MR. STRANCH: She apparently --

4 MS. JOHNSON: I think we've said enough on this
5 topic.

6 THE COURT: Thank you all.

7 MR. SCHRAMEK: Thank you.

8 THE COURT: See you in December.

9 (Adjourned 3:06 p.m.)

10

11 C E R T I F I C A T E

12 I, Catherine A. Handel, Official Court Reporter of the
13 United States District Court, do hereby certify that the
14 foregoing transcript, from Page 1 to Page 47, constitutes to the
15 best of my skill and ability a true and accurate transcription of
16 my stenotype notes taken in the matter of No. 13-md-2419-RWZ, In
17 Re: New England Compounding Pharmacy, Inc., Products Liability
18 Litigation.

19

20 November 18, 2015
21 Date

/s/Catherine A. Handel
Catherine A. Handel RPR-CM, CRR

22

23

24

25